ever, are not present where it is the party to an adjudicated suit who is injured. The wrong done is purely to his personal reputation and the dignity of the court is not at issue. A remedy is afforded in an action for defamation. The power to punish for contempt, born of necessity, and the exercise of which can be justified only by necessity,[27] should not be invoked in his support.

THE MISSOURI ILLEGITIMACY ACT. — At the common law,[1] a child born out of lawful wedlock[2] was *filius nullius*, and had no rights of inheritance or of support.[3] The harshness of this rule has long since been modified by legislation in every English-speaking jurisdiction.[4] In most states, the child is now recognized as the child of its mother[5]; they are given reciprocal rights of inheritance[6];

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279 Fed. 900 (S. D. N. Y., 1921); Fleming *v.* United States, 279 Fed. 613, (9th. Circ., 1922); People *v.* Lawrence, 23 Nat. C. & Rep. 534 (Cir. Ct. Ill., 1901). *Cf. Ex parte* Craig, 274 Fed. 177 (2nd Circ., 1921); *Ex parte* Robinson, 19 Wall. (U. S.) 505 (1873). See 34 N. J. L. J. 119. An analysis of these cases would justify the conclusion that some limitation should be placed upon the individual judge in regard to his power to punish for contempt, other than a review of the reasonableness of his action by the appellate court. The experience of the Pennsylvania and Mississippi judiciaries deprived of this power (see note 20, *supra*) would seem to indicate that society has advanced to a point where the necessity for the exercise of this summary power has disappeared. On the other hand, the experience of the English courts indicates that this power can be had without an accompanying abuse. Its continued existence would then seem to depend upon its wise and judicious exercise by the courts in cases where the necessity for such summary action is apparent beyond any reasonable doubt.

[27] See State *v.* Frew, 24 W. Va. 416, 477 (1884).

[1] On the history and philosophy of the common law rules on this subject, see Joseph Cullen Ayer, Jr., "Legitimacy and Marriage," 16 HARV. L. REV. 22. See also C. A. Herreshoff Bartlett, "Illegitimates and Legitimation," 54 AMER. L. REV. 563.

[2] The term "child born out of lawful wedlock" is used in preference to "bastard," to which usage has attached an unpleasant stigma, and "illegitimate," which is not strictly accurate. See DWIGHT, LAW OF PERSONS & PERSONAL PROPERTY, 256. The term excludes, of course, a child born to a widow within ten months after her husband's death. For a judicial definition of "legitimate child," see Gates *v.* Seibert, 157 Mo. 254, 272 (1900).

[3] See TIFFANY, DOMESTIC RELATIONS, 3 ed., 307. See also 16 COL. L. REV. 678. As to the status of the child born out of lawful wedlock, see TIFFANY, *op. cit.*, 304; DWIGHT, *op. cit.*, 263. See also Eaton *v.* Eaton, 88 Conn. 269, 277 (1914). While the child was said to be *filius nullius*, yet in some cases his relationship to his parents was recognized, as in the case of marriage within the forbidden degrees of consanguinity. The Queen *v.* Brighton, 1 B. & S. 447 (1861). As to whether the word "child" in a statute allowing recovery in case of death by wrongful act applies to a child born out of wedlock, see 19 MICH. L. REV. 562. See also 35 HARV. L. REV. 888.

[4] A very valuable compilation of the illegitimacy laws of the United States and certain foreign countries, with comments thereon by Prof. Ernst Freund, is found in FREUND, ILLEGITIMACY LAWS OF THE UNITED STATES, Bureau Pub. No. 42, U. S. Child. Bureau. See also 16 COL. L. REV. 698. For the history of such legislation, see FREUND, *op. cit.*, 9. See note 10, *infra*.

[5] See FREUND, *op. cit.*, 17. In one state, Connecticut, this recognition was accorded at the common law. Heath *v.* White, 5 Conn. 228 (1824). See Eaton *v.* Eaton, 88 Conn. 269, 278 (1914).

[6] See TIFFANY, *op. cit.*, 308; DWIGHT, *op. cit.*, 265; FREUND, *op. cit.*, 19. For the Missouri law, see Eldon R. James, "Some Aspects of the Status of

and there are provisions for establishing its paternity, and for imposing upon the father part of the burden of support.[7] Subsequent marriage of the parents legitimates the child.[8] Considerations of fairness to the child and to the mother, and of justice for the father, aided in bringing about this legislation. Perhaps the strongest voice was that of society itself, demanding relief from the burden of poverty, infant mortality, juvenile delinquency, and kindred evils arising from the helpless condition of the mother and child.[9]

These are the interests to be protected. They have yet much to ask from the social legislator.[10] Mother and child still face life at a disadvantage, and that disadvantage is a detriment to the com-

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Children in Missouri," U. OF MO. BULL., L. S. No. 10. Delicate questions arise in adjusting the conflicting claims of legitimate and illegitimate children. For instance, should children born out of wedlock take what the mother has received from her husband, to the partial exclusion of her children by that husband?

[7] See DWIGHT, *op. cit.*, 262. For an exhaustive summary of American support legislation, see FREUND, *op. cit.*, 25–34, 43.

The mother also has the right of custody and the correlative obligation of support. See DWIGHT, *op. cit.*, 262. See FREUND, *op. cit.*, 18, 20. In some states there are provisions for supervision and guardianship by the state. See note 35, *infra*.

[8] See TIFFANY, *op. cit.*, 300. See FREUND, *op. cit.*, 12, 22. See also C. A. H. Bartlett, *supra*, 574, *et seq.* On the question whether or not a child born of adulterous intercourse is legitimated by subsequent marriage of the parents, see E. R. James, *supra*, 9–12. Nearly the same result as is reached by legitimation may, in practice, be secured by adoption, without marriage, in many states. See TIFFANY, *op. cit.*, 310. See E. R. James, *supra*, 21 *et seq.*

[9] The usual proportion of births out of lawful wedlock in the United States is from 3 per cent to 4 per cent. See ROSS, PRIN. SOCIOLOGY, 16. There are over 32,000 such births annually in this country. See 1 ILLEGITIMACY AS A CHILD WELFARE PROBLEM, Bureau Pub. No. 66, U. S. Child. Bureau, 5. Inadequacy of birth registration makes the accuracy of these figures problematical. For numerous statistics on the subject, see *ibid*, 18–27. A very careful statistical analysis of the problem has been made in Massachusetts. See 2 ILLEGITIMACY AS A CHILD WELFARE PROBLEM, Bureau Pub. No. 75, U. S. Child. Bureau. The percentage of births out of wedlock is decidedly higher in large cities than in less congested communities.

As to the nature and extent of the burden imposed upon the public by births out of wedlock, see 2 ILLEG. WELF. PROB., *supra*, 64. See also J. Castberg, "The Children's Rights Laws in Norway," 16 JOUR. SOC. COMP. LEG., n. s. pt. 2, 283, 290. Infant mortality is three times as high among children born out of wedlock as among those born in wedlock. For statistics, see 1 ILLEG. WELF. PROB., *supra*, 28–35; 2 ILLEG. WELF. PROB., *supra*, 41. The effect of birth out of wedlock on juvenile delinquency is equally marked. See *ibid*, 55, 57. Statement of the sociological problem may be found in STANDARDS OF LEGAL PROTECTION FOR CHILDREN BORN OUT OF WEDLOCK, Bureau Pub. No. 77, U. S. Child. Bureau, 100–105. It is obvious that no amount of legislation can cure the evil or entirely overcome its effects. Only alleviation can be expected. See *ibid*, 81.

[10] The obstacles met by proposals for legislation along the liberal lines of the North Dakota and Norwegian Acts (notes 21, 22 *infra*) are several. Perhaps inertia is most effective. "The most striking feature of bastardy legislation is its stationary character." See FREUND, *op. cit.*, 29. In many states there has been no radical change in the law since before the Civil War. There is also an idea that the interests of the institution of marriage demand that the fruit of illicit relations must be penalized and made odious. See Ernst Freund, "The Present Law Concerning Children Born out of Wedlock, and the Possible Changes in Legislation," STAN. LEG. PROT., *supra*, 26, 27. See also C. A. H. Bartlett, *supra*, 582.

munity.[11] Further steps in alleviation of the problem are being sought.[12] The Commissioners of Uniform State Laws have drafted a "Uniform Illegitimacy Act," [13] embodying provisions for the care, maintenance and supervision of mother and child, and for better enforcement of the father's responsibility.[14] The existing laws of thirteen states [15] provide means for the legitimation of children without the marriage of their parents [16]; eighteen states [17] provide for inheritance from the father upon some act manifesting his consent thereto,[18] without marriage or adoption; and in five states [19] the child inherits from the father without his act or consent.[20] North Dakota and Arizona statutes make every child the legitimate child and heir of its natural parents.[21] This legislation is the closest

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[11] As to the effect of birth out of wedlock on infant mortality and juvenile delinquency, see note 9, *supra*. See also Edith Foster, "Protection and Care as a Public Health Measure," STAN. LEG. PROT. *supra*, 37. As to the social problem involved, see C. C. Carstens, "What is the Practical Ideal of Protection and Care for Children Born out of Wedlock," STAN. LEG. PROT., *supra*, 95. For an exhaustive bibliography of the subject, see 1 ILLEG. WELF. PROB., *supra*, 59–95.

[12] For example, see resolutions of regional conferences held in 1920 under the auspices of the U. S. Children's Bureau, STAN. LEG. PROT., *supra*, 14, *et seq.* See also syllabus of propositions adopted by these conferences as a basis of a program for illegitimacy legislation, *ibid*, 20, *et seq.*

[13] "A Bill for an Act Relating to Children born out of Wedlock and to make Uniform the Law with Reference Thereto," adopted at the 32nd annual meeting of the Commissioners of Uniform State Laws, San Francisco, August, 1922.

[14] *Cf.* the proposals referred to in note 12, *supra*. The proposed Uniform Act is silent on the question of inheritance. The father's estate is, however, made liable for the support of the child.

[15] See FREUND, *op. cit.*, 22. The states are: Alabama, Arizona, California, Georgia, Idaho, Michigan, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, South Dakota, Tennessee.

[16] Where no provision is made for legitimation, practically the same effect can generally be obtained by adoption. See TIFFANY, DOMESTIC RELATIONS, 3 ed., 300, 310. See also E. R. James, *supra*, 22, *et seq.* Adoption often has the advantage of not disclosing the fact of illegitimate parentage and birth. See FREUND, *op. cit.*, 23.

[17] These states are: Alabama, California, Georgia, Idaho, Indiana (under special circumstances), Kansas, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, South Dakota, Tennessee, Utah, Washington, Wisconsin.

[18] This "consent" must generally be manifested by recognition by the father, reception into his family, etc. In some states a decree of court is required, proceedings to be initiated by the father; *e.g.*, Georgia, Mississippi, North Carolina, Tennessee.

[19] Arizona, Iowa, Missouri, North Dakota, Oregon. In Louisiana the child inherits if the father leaves no other relatives.

[20] In Iowa, the right of inheritance is created by public recognition of the child by the father, or by proof of paternity during the father's life. See 1897 IOWA CODE, SUPPLEMENTS 1913–15, § 3385. In Oregon, a decree of paternity is required, within three years of the child's birth and during the father's life. See 1917 LAWS ORE., c. 48, § 14.

[21] "Every child is hereby declared to be the legitimate child of its natural parents and as such is entitled to support and education, to the same extent as if it had been born in lawful wedlock. It shall inherit from its natural parents and from their kindred heir lineal and collateral." See 1917 LAWS N. D., c. 70, § 1; 1921 LAWS ARIZ., c. 114. § 1. For comment on the North Dakota Act, see FREUND, *op. cit.*, 25, 56. See also Lillian Grace Topping, "The North Dakota Law of 1919 (1917?)," STAN. LEG. PROT., *supra*, 48.

American approach to the Castberg Act of Norway, under which the father of every child born out of lawful wedlock is compelled to assume the full obligation that is owed to a lawful child.[22]

A recent Missouri statute[23] presents a novel reaction to the problem of the child born out of wedlock. Missouri was one of the very few states in which there were no statutory provisions for the support of the child.[24] Peculiar conditions in that state aggravated the situation.[25] In 1919 and in 1921 a comprehensive code was submitted to the legislature, embracing provisions for support by the father, inheritance from him, and, following the lead of Norway and North Dakota, legitimacy of all children as if born in lawful wedlock.[26] The inheritance provision alone was enacted, and this was modified to provide that the child should be the heir of the father only upon the establishment of paternity in an action at law begun during the lifetime of the father, following the procedure of an ordinary civil suit, and maintainable only where the father and child belong to the same race.[27] In this statute Missouri recognizes the

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There seems to be but little trustworthy data by which the actual working of the law and its effect can be measured.

[22] This act was passed in 1915. For detailed discussion of the statute, see J. Castberg, "The Children's Rights Laws in Norway," 16 JOUR. SOC. COMP. LEG., n. s., pt. 2, 283, *et seq.* See also comment on the Act in 16 COL. L. REV. 698. Sweden also has recent legislation on the subject, though of not so far-reaching character. See 11 JOUR. CRIM. L. & CRIMINOL., 284.

[23] *See* 1921 LAWS MO., 118.

[24] The other states not having support legislation in 1919 were Idaho, New Mexico, Texas and Virginia. See FREUND, *op. cit.*, 28, *et seq.* The absence of such legislation has been commented on judicially. See Easley *v.* Gordon, 51 Mo. App. 637, 641 (1892). For discussion of the situation in Missouri, see REPORT OF MISSOURI CHILDREN'S CODE COMMISSION FOR 1918. See also E. R. James, *supra.*

[25] As to the magnitude of the illegitimacy problem in Missouri, see REPORT OF MISSOURI CHILDREN'S CODE COMMISSION, 1918. In 1912 there were recorded in the State 1822 births out of lawful wedlock. The percentage of such births is increased on account of the large number of colored people in the State, the birthrate out of wedlock being several times as high among negroes as among whites. See statistics in 1 ILLEG. WELF. PROB., *supra*, 20–27. See also ROSS, PRIN. SOCIOLOGY, 16. In 1917 there were in Missouri over 55,000 colored children under the age of twenty. See REP. MO. CODE COMM., *supra*, 37.

[26] See REP. MO. CODE COMM., *supra*, 87–93.

[27] See 1921 LAWS MO., 118. "§ 311. A child hereafter born out of wedlock shall be capable of inheriting and transmitting inheritance from both its parents, and its parents and other blood relatives shall be capable of inheriting and transmitting inheritance from such child in like manner as if it had been born in lawful wedlock: Provided, however, that the provisions in this section shall not apply except in cases where the paternity of such child shall have been established by an action at law begun during the lifetime of the alleged father of such child.

"§ 311 *a*. Whenever any child shall have been born out of lawful wedlock and the father and mother of such child shall not thereafter intermarry, then the mother of such child or any person of kin within the second degree of consanguinity shall be authorized to institute a suit in the circuit court having competent jurisdiction, the object and purpose of which shall be the obtaining of a decree establishing the paternity of said child; the practice and proceedings relative thereto shall be the same as in ordinary civil cases; providing, however, that no suit shall be instituted for the establishment of such paternity wherein the child and the alleged father do not belong to the same race."

"§ 312. If a man having a child by a woman, shall hereafter marry such

claim of the child to share in an intestate father's estate, a recognition accorded by very few other states.[28] But Missouri refuses to do what nearly all other states[29] have done for half a century;[30] *i.e.* compel the parent to provide for the child's support. The present statute can hardly be effective towards solving the social problem,[31] since the father's position in life is not usually such that his estate is of any value,[32] although he is in his lifetime generally able to contribute to the child's support.[33]

This legislation suggests many questions aside from the primary one of inheritance from the father. Should the father inherit from the child?[34] Under what circumstances shall a suit be brought to establish paternity;[35] what shall be the procedure;[36] and should

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woman, such child shall be deemed the lawful child of both father and mother as from the time of its birth. And if a man shall marry a woman having, at the time, a child or children born out of wedlock and shall take such child or children into his home and shall hold them out as his own, such act shall be deemed conclusive proof that such man is the father of said child or children."

[28] See notes 17, 18, 19, 20, *supra*.

[29] See FREUND, *op. cit.*, 28, *et seq.*, and facing p. 58.

[30] See note 10, *supra*.

[31] That problem seems to arise largely from poverty. See notes 9, 11, *supra*. It takes ready money rather than a prospective right of inheritance to cope with immediate poverty. Further, it is unlikely that the right of inheritance is as potent a deterrent as is the prospect of having to contribute to the support of a possible child or go to jail. Of course neither inheritance nor support can remove the social stigma attaching to birth out of lawful wedlock, and hence no amount of legislation of any sort can be expected to solve the problem in its entirety. See J. Castberg, *supra*, 287.

[32] For statistical data concerning the economic status of fathers in Boston, see 2 ILLEG. WELF. PROB., *supra* 46. The basis of the social danger is poverty. See notes 9, 11, *supra*, and reference therein.

[33] Data as to the collectibility of support money from fathers may be found in STAN. LEG. PROT., *supra.*, 135, *et seq.*, 140. See also 2 ILLEG. WELF. PROB., *supra*, 47. The Probation Officer of the Central Municipal Court of Boston states that the average weekly support order issued by that Court in 1920 was $4.55 per man; in 1921, $4.89. During those years, support orders issued in 70 per cent of the bastardy cases handled by the Court.

[34] This is, of course, the effect secured by statutes giving the child the same rights and status as if born in lawful wedlock. For instance, the North Dakota and Arizona Acts, note 21, *supra*.

[35] The proposed Uniform Illegitimacy Act, § 17, provides for proceedings brought by the mother, or by the authorities charged with support, if the child is likely to become a public charge. If the mother is dead or disabled, the child may bring action by its guardian or next friend. As to the practicability and advisability of state action and state guardianship, see FREUND, *op. cit.*, 33, 36, 54. Minnesota has perhaps the most advanced legislation of any state concerning state guardianship. See 1917 LAWS MINN., c. 194, §§ 1–5; c. 212, §§ 8, 9; 1921 LAWS MINN., c. 489. For discussion of this Act, see William W. Hodson, "The Scope and Purpose of the Minnesota Law," STAN. LEG. PROT., *supra*, 40. See also *ibid*, 33. As to the necessity of and means for state supervision of mothers and children, see Wilfred S. Reynolds, "Public Supervision and Guardianship," *ibid*, 86; James F. Kennedy, *ibid*, 90; John A. Brown, *ibid*, 91; Homer Folks, *ibid*, 143.

The proposed Act, § 19, further provides that if the father dies after the preliminary hearing, the proceedings shall be continued against his personal representative. Similar provisions are already found in some of the states. See FREUND, *op. cit.*, 45. There is increased danger of blackmail if proceedings

the bringing of a suit be compulsory? [37] Should the criminal law be available in the enforcement of the decrees rendered in these suits? [38] Should it be made possible to effect legitimation by acknowledgment of the child, without court proceedings? [39] Should difference in race bar establishment of paternity? [40] The proposed Uniform Illegitimacy Legislation will soon present these and other problems of the same nature [41] to the legislatures of many states.

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can be instituted after the alleged father's death, against his estate. For other suggested provisions in precaution against blackmail, see REP. MO. CODE COMM., *supra*, 24, 198. The proposals of the Missouri Children's Code Commission embodied a provision that should it be impossible to establish the paternity of a child because of its mother having had intercourse with several men during the period in which the child must have been begotten, each such man should be liable for the support of the child during its minority. See REP. MO. CODE COMM., *supra*, 89.

[36] For extended discussion of types of procedure for establishing paternity, see STAN. LEG. PROT., *supra*, 60 *et seq.*, 124 *et seq.*

The question in what court the suit shall be brought is important. For generalization of the present statutes, see FREUND, *op. cit.*, 34. The Juvenile Court is favored by many, as a court of "socialized equipment." There is a well recognized need for individualization in the treatment of delinquents, defectives, and other unfortunates. See ROSS, PRINCIPLES OF SOCIOLOGY, 648. Many advocate that such individual attention be given children born out of wedlock and their mothers, through probation officers and similar administrative machinery. See discussion of this and other questions in STAN. LEG. PROT., *supra*, 29, 41, 44, 60 *et seq.*, 124 *et seq.*

Private hearings are provided for in Michigan and New York, and in Minnesota the records are shielded from publicity. While the prospect of publicity may be a deterrent, it would seem to facilitate blackmail, and to deter the more scrupulous and timid from asserting their rights. The lurid revelations of many public newspapers make even a more fearsome prospect than a crowded courtroom.

As to what is sufficient proof of paternity, see FREUND, *op. cit.*, 39. See also W. Logan MacCoy, "Law of Pa. Relating to Illegitimacy," 7 JOUR. CRIM. L. & CRIMINOL., 505, 516. One of the most difficult problems is that of the absconding father. For treatment of it and summary of present legislation, see FREUND, *op. cit.*, 46–52.

[37] It seems harsh to make the child suffer for the unwillingness of many mothers to proceed against the father, because of timidity, undue publicity, ample means, etc. Furthermore, it is not unlikely that fear of compulsory suit acts as a deterrent. No state has so far provided for compulsory determination of paternity in every case. But see note 35, *supra*. See also 1 ILLEG. WELF. PROB., *supra*, 40.

[38] In many states failure to make decreed support payments is a misdemeanor. See FREUND, *op. cit.*, 30. The Massachusetts statute is typical. 1913 LAWS MASS., c. 563. In general, criminal prosecutions are probably cheaper, speedier and simpler than contempt proceedings. For a discussion of the subject, see Ernst Freund, "The Present Law Concerning Children born out of Wedlock, and Possible Changes in Legislation," STAN. LEG. PROT., *supra*, 26, 31.

[39] Such provisions are common. See notes 15 ,16, *supra*.

[40] The fact that one purpose of all illegitimacy legislation is to protect the interests of the child argues against race discrimination. The child is equally innocent whatever his parents' color. The social factors involved are complex. See note 25, *supra*.

[41] A large number of proposals for legislation, involving many interesting questions, are embodied in a Syllabus of Propositions to serve as a "Basis of a Program for Illegitimacy Legislation," approved by a committee of the U.S. Children's Bureau Regional Conferences held in 1920. They are printed in STAN. LEG. PROT., *supra*, 20 *et seq.*